Rozmi bin Yusof v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05–394 OF 2010
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
7 MAY 2013

Criminal Procedure — Appeal — Conviction, against — Whether trial judge's verdict riddled with flaws rendering conviction unsafe — Whether conviction wholly based on uncorroborated testimony of interested witness — Whether plea of self-defence established entitling accused to acquittal

The appellant ('accused') was convicted and sentenced to death by the High Court for murdering a person ('the deceased') during a fight. In his instant appeal against conviction and sentence, the accused said the trial judge failed to appreciate that his killing of the deceased was in self-defence. The accused said the deceased had stabbed him in an earlier fight and later attacked him again with a dangerous weapon, a curved dagger or kerambit. The accused also said his conviction was largely based on the evidence of the deceased's brother, SP8, who not only was an interested witness but had himself participated in the fight between the accused and the deceased. The accused said his slashing of the deceased's neck from the back with a cleaver he found at the scene was accidental and in response to the deceased's attack and that he had no intention to kill the deceased. The trial judge rejected the accused's story as failing to create a reasonable doubt on the prosecution's case and convicted the accused of murder.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the accused:

(1) The trial judge's judgment was flawed in various aspects. His failure to direct himself according to the law amounted to a misdirection resulting in miscarriage of justice and attracted the jurisprudence of 'not safe to convict' (see para 17).

(2) The trial judge failed to comply with the *Radhi*'s directions and to address his mind to the fact that SP8 was an interested witness. He failed to consider that the appellant had also suffered injuries and that the deceased was armed with a dangerous weapon. Very importantly, the judge failed to consider the issue of self-defence which entitled the appellant to an acquittal. The trial judge also failed to consider whether the exceptions to murder under s 300 of the Penal Code ('the Code') applied (see para 8).

(3) The trial judge failed to make a finding of fact on whether the appellant

had used force disproportionate to the attack by the deceased. The fact that the deceased was armed with a dangerous weapon and that PW8 was also involved in the fight attracted s 96 of the Code (right of private defence). Failure to consider the defence in the right perspective — the defence was not inherently incredible in the instant case — rendered the conviction perverse and in breach of s 96 and attracted the constitutional protection afforded by art 5(1) of the Federal Constitution calling for the appellate court to intervene and set aside the conviction (see para 13).

(4) PW8 was the main prosecution witness and he was also an interested eye-witness. His evidence placed the fault on the appellant despite the evidence of PW10 who saw PW8, the appellant and the deceased being involved in a fight. PW8's evidence ought to have been treated with caution and as requiring corroboration but the trial judge failed to direct himself on these aspects making his decision perverse and not according to law (see paras 10–11).

[Bahasa Malaysia summary

Perayu ('tertuduh') disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh seseorang ('si mati') semasa pergaduhan. Dalam rayuannya terhadap sabitan dan hukuman, tertuduh menyatakan yang hakim perbicaraan gagal untuk memutuskan yang pembunuhannya ke atas si mati adalah untuk mempertahankan diri. Tertuduh menyatakan yang si mati telah menikamnya di dalam pergaduhan terdahulu dan kemudiannya menyerangnya lagi dengan senjata berbahaya, pisau melengkung atau kerambit. Tertuduh juga menyatakan sabitannya secara besarnya berdasarkan atas keterangan saudara lelaki si mati, SP8, orang yang bukan sahaja saksi yang berkepentingan tetapi dia juga mengambil bahagian dalam pergaduhan di antara tertuduh dan si mati. Tertuduh menyatakan pengelarannya ke atas leher si mati daripada belakang dengan pisau yang dijumpai di tempat kejadian adalah tidak sengaja dan dalam membalas serangan si mati dan bahawa dia tidak berniat untuk membunuh si mati. Hakim perbicaraan menolak hujahan tertuduh kerana gagal untuk membentuk keraguan munasabah ke atas kes pendakwaan dan menyabit tertuduh dengan pembunuhan.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan membebaskan dan melepaskan tertuduh:

(1) Penghakiman hakim perbicaraan adalah cacat dalam pelbagai aspek. Kegagalannya untuk mengarahkan dirinya mengikut undang-undang merupakan salah arah menyebabkan ketidakadilan dan menggunakan jurisprudens 'not safe to convict' (lihat perenggan 17).

(2) Hakim perbicaraan gagal untuk mematuhi arahan-arahan kes *Radhi* dan untuk mengarahkan mindanya kepada fakta bahawa SP8 adalah saksi yang berkepentingan. Beliau gagal untuk mempertimbangkan bahawa

perayu juga mengalami kecederaan dan bahawa si mati bersenjatakan dengan senjata berbahaya. Yang paling penting, hakim gagal untuk mempertimbangkan isu mempertahankan diri yang memberikan hak kepada perayu kepada pembebasan. Hakim perbicaraan juga gagal untuk mempertimbangkan sama ada pengecualian-pengecualian kepada pembunuhan di bawah s 300 Kanun Keseksaan ('Kanun') diguna pakai (lihat perenggan 8).

(3) Hakim perbicaraan gagal untuk membuat dapatan fakta sama ada perayu telah menggunakan kekerasan yang tidak seimbang terhadap serangan oleh si mati. Fakta bahawa si mati bersenjatakan dengan senjata berbahaya dan bahawa PW8 juga terlibat di dalam pergaduhan membangkitkan s 96 Kanun (hak membela diri sendiri). Kegagalan untuk mempertimbangkan pembelaan dalam perspektif yang betul — pembelaan yang tidak kukuh dalam kes ini — menyebabkan sabitan bertentangan dan memungkiri s 96 dan membangkitkan perlindungan perlembagaan yang diperuntukkan oleh perkara 5(1) Perlembagaan Persekutuan yang memerlukan mahkamah rayuan untuk campur tangan dan mengetepikan sabitan tersebut (lihat perenggan 13).

(4) PW8 adalah saksi utama pihak pendakwaan dan dia juga saksi berkepentingan. Keterangannya meletakkan kesalahan ke atas perayu walaupun keterangan PW10 yang nampak PW8, perayu dan si mati terlibat dalam pergaduhan. Keterangan PW8 patut diambil kira dengan berhati-hati dan memerlukan sokongan tetapi hakim perbicaraan gagal untuk mengarahkan dirinya ke atas aspek ini membuatkan keputusannya bertentangan dan tidak mengikut undang-undang (lihat perenggan 10–11).]

Notes

For cases on conviction, against, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 371–421.

Cases referred to

Ahmad Mukamal bin Abdul Wahab, Suhana binti Kamarudin and Shawal bin Hashil v PP Criminal Appeal No C-05–44 of 2011 (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (folld)
Mohd Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Rajinder v State (1955) 5 SCC 187, SC (refd)
Sochima Okaye v PP [1995] 1 MLJ 538, CA (refd)

Legislation referred to

Federal Constitution art 5(1)
Penal Code ss 96, 97, 98, 99, 100, 101, 102, 103, 104, 105,106, 300, 302

A **Appeal from**: Suit No 45–14 of 2007 (High Court, Kota Bharu)

Ahmad Nizam Mohamed (Alias Ibrahim with him) (Azahir Surainie & Azizan Ariff) for the appellant.
Najib bin Zakaria (Attorney General's Chambers) for the respondent.

B **Hamid Sultan JCA (delivering judgment of the court):**

[1] The appellant's/accused appeal came up for hearing on 15 March 2013 and on the same day upon hearing both parties we allowed the appeal. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the judgment and approved the same. This is our judgment.

C

[2] The appellant was charged for murder. The charge reads as follows:

D

> Bahawa kamu pada 31.8.2005, pada jam lebih kurang 9.00 malam bertempat di sebuah rumah tanpa nombor, di Kg Bonggol Kerian, dalam jajahan Pasir Puteh, di dalam Negeri Kelantan telah membunuh Rodzi bin Mohamad KPT 771216-03-5903 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

E

[3] The learned trial judge at the end of defence case convicted and sentenced the appellant to death pursuant to s 302 of the Penal Code. Before us the appellant has filed a lengthy petition in essence to contend the learned judge, inter alia, failed to consider (a) the deceased carried a weapon; (b) the accused suffered injuries; (c) SP8 was an interested witness; (d) self defence.

F

[4] At the commencement of the hearing learned counsel for the appellant requested an amendment to para 14 of the petition of appeal to insert s 96 of the Penal Code even though the said paragraph did mention the defence. The learned deputy public prosecutor was magnanimous and did not object. We allowed the amendment. We must also say the learned deputy public prosecutor had placed a comprehensive submission in an articulate manner.

G

H **[5]** For the purpose of this appeal two paragraphs of learned deputy public prosecutor's submission will fairly represent the prosecution case as well as the appellant's defence. They are as follows:

I

> The Appellant claimed trial. When 7 witnesses gave evidence from the commencement of the trial, the case was heard by Justice Azman bin Husin while the continuation of the trial was handled by Justice Ahmad Zaidi bin Ibrahim with the consent of both the defence and the prosecution. At the end of prosecution case, the Learned Trial Judge found the prosecution had established prima facie case against the Appellant hence he was directed to enter defense. The Appellant in his defense claimed that it was self defense and the act of slashing the neck from the back

was accidental act in response to the attack by victim. The Learned Trial Judge at the end of the defense found that such defense failed to create reasonable doubt and went against the weight of evidence as adduced by the prosecution. In short the prosecution had successfully proved overwhelming evidence be it by way of direct or indirect evidence.

The Appellant in his defense contended that prior to the vicious fight occurred on the fateful night, he and the deceased had already engaged in a fight in Kampung Chengal Batu, the deceased's village. He testified that he was stabbed by the deceased in that fight. (Please see page 110 of Appeal Record). However on the fateful night, the Appellant claimed that the deceased draw a curved dagger when he and SP-8 were descending through the stairs. In response to that he jumped to the verandah and took a cleaver used to cut fire woods to engage with the deceased. According to the Appellant, SP-8 also participated in the fight between him and the deceased. The Appellant in his evidence did admit that he had slashed and that he fell down to 'jemuran' when SP-8 kicked him. He immediately absconded and went to his auntie's house. He told to her aunties what had happened. He also took the cleaver and placed it at his auntie's house. However upon advise by his sister and his auntie, the Appellant surrendered to the police station. The Appellant also testified in the following as appeared at page 113 of Appeal Record and it is most crucial:

Q: Kenapa anda pergi ke luar bilik dan panggil dia pada malam itu?

A: Kerana saya bergaduh dengan dia dan saya ingatkan dia mencari saya oleh itu saya nak tanya dia. Saya tidak ada niat langsung untuk keluar dan pergi tetak dia. Saya tidak ada niat untuk membunuh SiMati.

Q: Bagaimana bentuk kerambit tersebut?

A: Mata kerambit itu melengkung.

THE BRIEF FACTS

[6] What is important to note in this case is that there is evidence to show that the victim was armed with a curved dagger (*kerambit* or also known as *lawi ayam*) when he went to the house where the incident occurred. The victim's brother ('PW8') was also with him. PW8 was the main witness and he was also an interested eye witness. His evidence places the fault on the appellant despite the fact that there was evidence of PW10 that she saw PW8, the appellant and the deceased involved in a fight. The curved dagger is a weapon which is capable of piercing and ripping off the vital organ of the body. In short it is sufficiently dangerous weapon. PW8 in his evidence confirms the same:

Q: Selain parang, ada senjata lain semasa OKT dan abang anda bergelut.

A: Ya

Q: Senjata apa?

A: Kerambit

[7] The relevant part of PW10 evidence reads as follows:

Q: Pada malam itu ada apa-apa pergaduhan berlaku di rumah itu?

A: Ya, ada.

- Masa saya naik selangkah untuk kali ketiga untuk ambil kain di bilik untuk keringkan kain yang telah dibilas saya dengar macam orang kena tampar dan lepas itu saya nampak 3 orang sedang bergelut dan saya ambil anak saya dan terus lari ke rumah hadapan untuk minta tolong.

- Pergaduhan berlaku di ruang tamu.

[8] The learned trial judge had set out the defendant's defence but strikingly failed to comply with what we call as *Radhi*'s directions (see *Sochima Okaye v Public Prosecutor* [1995] 1 MLJ 538). In addition the learned judge has failed to address his mind to the fact that SP8 is an interested witness and that the appellant has also suffered injuries and the deceased did carry a weapon to the place of incident. Very importantly the learned judge failed to consider the issue of self defence which will entitle the appellant to an acquittal. In addition we must say when a person is charged for murder the court must consider whether the exception to murder under s 300 applies. In the instant case the learned trial judge did not consider the exceptions which reads as follows:

> Exception 1—Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> Exception 2—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.
>
> Exception 3—Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.
>
> Exception 4—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> Exception 5—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

[9] If the exception applies then culpable homicide may not amount to murder. It may attract lesser penal sanction. We have dealt with this area of jurisprudence in *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328 where Hamid Sultan bin Abu Backer made the following observations:

> Basically s 299 deals with unlawful killing. For the killing to warrant the death penalty one of the criteria set out in s 300 must be satisfied for the accused to be punished under s 302 of the Penal Code which reads as follows:
>
> Whoever commits murder shall be punished with death.
>
> However, if the prosecution cannot satisfy one of the provisos to s 300 but it is an unlawful killing as set out in s 299 and the defence has placed a credible defence of aggravating and/or mitigating factors as opposed to denial or alibi, than the punishment will have to be lesser than that of death penalty and in almost all cases of serious nature the punishment will have to be under s 304 of the Penal Code or for lesser conduct or factor it may attract milder sentencing provision under the Penal Code.
>
> Only in cases where the defence succeeds in the defence of self defence as set out in s 96 of the Penal Code, the accused will be acquitted or in case of insanity the accused will be detained at the Pleasure of the Yang Di Pertuan Agong as set out in s 348 of the Criminal Procedure Code, or lesser sentence when the defence succeeds on mitigating factors (eg grave sudden provocation) to reduce the charge to attract lesser sentence.
>
> When the defence is mere denial then there cannot be a finding of fact to reduce the charge to s 304 f the Penal Code. In cases where the defence is one of denial the issue will be only whether prosecution has established the required elements to sustain conviction and or sentence under s 302 of the Penal Code, failing which the accused has to be acquitted, applying the maximum evaluation and beyond reasonable test as propounded by case laws (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

INTERESTED WITNESS

[10] In the instant case SP8 the brother of the accused was an interested witness and he did participate in the fight. His evidence ought to be treated with caution and was not done so in the instant case. We have dealt with this area of jurisprudence in great detail in *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328, we do not wish to repeat the same. In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 the Federal Court had this to say:

> It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a purpose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration.

[11] In our considered view the failure by the trial judge to follow the

directions set out in *Magendran*'s case in respect of caution and corroboration makes the decision perverse and not according to law. This will also attract art 5(1) of the Federal Constitution to order an acquittal as the evidence to convict was based solely on PW8's evidence which is not safe and according to law. The court has no jurisdiction to deprive the life and liberty of the subject unless the decision is made according to law. Article 5(1) stated as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

THE RIGHT OF PRIVATE DEFENCE

[12] Sections 96–106 of the Penal Code codifies the law relating to right of private defence of person and property including the extent of and limitation to exercise such right, (see *Rajinder v State* (1955) 5 SCC 187). Section 96 of the Penal Code states:

> Nothing is an offence which is done in the exercise of the right of private defence.

[13] As long as the force to defend is not disproportionate to the attack by the aggressor the defence under s 96 will succeed and a conviction cannot stand. Whether such force to defend was disproportionate is one of finding of fact and the learned trial judge has failed to adumbrate this in the judgment. We are of the considered view that the fact that the deceased carried a dangerous weapon to the scene of the crime where subsequently a fight ensued, and that PW8 was also involved in the fight, attract s 96 of the Penal Code. Failure to consider the defence in the right perspective will render the decision perverse and in breach of s 96, which will attract the constitutional protection under art 5(1), calling for the appellate court to intervene and set aside the conviction. Furthermore, in this case these was the evidence of PW7, Dr Adam who testified as to the injuries suffered by the appellant and as can be seen also in exh P48.

[14] In the instant case after having pursued the appeal record in extenso we do not see anything inherently incredible about the defence story.

[15] The hallmark in judgment writing in criminal case necessarily require the court to consider fairly and justly the defence story without attaching too much on legal niceties and strictly follow the *Radhi*'s direction which we had adumbrated in great detail in the case of *Ahmad Mukamal bin Abdul Wahab, Suhana binti Kamarudin and Shawal bin Hashil v Public Prosecutor* Criminal Appeal No C-05–44 of 2011. And be very conscious of the constitutional protection given to the accused in art 5(1) before depriving the accused of his life or liberty.

[16] Failing to adhere to what we have said earlier will in actual fact make the judgment a scrap paper unworthy of any consideration in law as it is a notorious proposition in our criminal jurisprudence that a person is innocent until proven guilty. The appellate court is bound to set aside the conviction if the above issues are not dealt with by the trial judge unless there are sufficient evidence to convict the accused for the offence charged or reduction of the charge as the case may be, disregarding the judgment or part of the judgment.

[17] In the instant case we are of the view that the judgment is flawed in various aspects. And the failure of the trial judge to direct himself according to law amounts to misdirection resulting in miscarriage of justice, and attracts the jurisprudence 'not safe to convict' (see *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328). In *Sochima Okaye v Public Prosecutor* [1995] 1 MLJ 538, Justice Gopal Sri Ram had this to say:

> The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker. Had he done so he may well have held that he was not, in which event our task would have been made that much easier. Unfortunately he did not and it is our view that the failure by the learned judge to administer unto himself the Radhi direction renders his ultimate conclusion fatally flawed.
>
> In our judgment, the failure of a judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-direction or a misdirection by a judge to a jury. *Rameshwar v State of Rajasthan* AIR 1952 SC 54; *Tan Yook Suan v R* [1954] MLJ 116 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr SCJ (now FCJ) stated the principle in the following words:
>
> > Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy* 5 Cr App R 270: '… the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.
> >
> > We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.
>
> Before us, the learned deputy fairly, and quite properly, conceded that the learned judge was duty bound, in the light of his earlier finding, to administer unto himself the Radhi direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

[18] In conclusion for reasons stated above, we take the view that it is not safe

to convict. And accordingly the conviction and sentence by the High Court is set aside. The appellant is acquitted and discharged.

[19] We hereby order so.

Appeal allowed, conviction and sentence set aside and accused acquitted and discharged.

Reported by Ashok Kumar